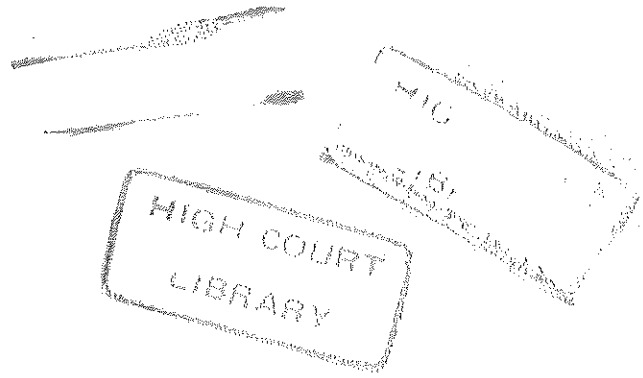


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The Judiciary



**IN THE HIGH COURT OF MALAWI**

**CIVIL DIVISION**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 713 OF 2018**

**Between**

**RUTH FABIANO (A Minor suing through her mother and litigation guardian  
DOREEN JIMU) .....CLAIMANT**

**-and-**

**MR. GANIZANI MASANZA ..... 1<sup>ST</sup> DEFENDANT**

**PRIME INSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

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**CORAM: A.J. Banda, Assistant Registrar**

Mr. Mwantisi, for the Claimant

Mr. Stenala Chisale, for the Defendants

Ms. C. Kazembe, Clerk/ Official Interpreter

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**JUDGMENT ON ASSESSMENT OF DAMAGES**

**Background**

By the Order of the Court dated 29<sup>th</sup> May, 2020, judgment on liability was entered against Mr. Ganizani Masanza (1<sup>st</sup> Defendant) and Prime Insurance Company Limited (2<sup>nd</sup> Defendant) that the two defendants should pay Ruth Fabiano, (Claimant and minor suing through Doreen Jimu, her mother and litigation guardian), damages for personal injuries to be assessed by the Registrar if the parties did not agree within 14 days from that date. This order arose from the proceeding commenced by the claimant asserting that the 1<sup>st</sup> defendant who was insured by the 2<sup>nd</sup> defendant, negligently drove motor vehicle registration number KK 4547 Toyota Hiace minibus which hit the claimant as she crossed the Limbe – Zomba road at a place called Good Samaritan.

The claimant claimed for damages for pain, suffering and loss of amenities of life, damages for deformity and disfigurement, K3, 000.00 cost of police report, K21, 000.00 cost of medical report and cost of the action. I heard the parties for the purposes of assessment of damages.

### **Evidence**

The only witness in the assessment hearing was the claimant's mother Doreen Jimu. She adopted a witness statement that was filed earlier as her evidence. In her statement she said that on 16<sup>th</sup> August, 2018 her daughter was involved in an accident in which the daughter sustained a fracture on both legs namely, a fracture of the distal fibula on the right leg, and a fracture of mid-shaft tibia and fibula of the left leg. She also had multiple bruises over the face, both fore arms and abdomen. She tendered a police report detailing the accident, marked "DJ 1".

It was Doreen Jimu's evidence that her daughter was taken to Queen Elizabeth Central Hospital (QUECH) where she was treated. She tendered the medical report marked "DJ 2". She further said that despite the treatment, her daughter has been having difficulties in walking and her legs have been deformed. She also stated that her daughter was unable to attend school due to her condition.

She also said that she had paid K3, 000.00 for the police report, and K21, 000.00 for the medical report respectively. She said that she was claiming for damages and the money spent on the two earlier mentioned reports.

In cross examination, Doreen Jimu said that her daughter was able to walk but that at times she walked with difficulties such that she even cries in pain. She also said that she had to carry her to climb the stairs to room 64 of the Court Building which is on the 2<sup>nd</sup> floor. She also said that her daughter was not attending school.

In re-examination, Doreen Jimu said that her daughter would be attending school had the schools not been closed due to the covid-19 pandemic, even though her daughter had stopped attending school earlier before schools closed due to covid-19 pandemic, due to the injuries she sustained in the accident concerning this matter.

The claimant adopted the skeleton arguments she had filed through counsel as final submissions. The defendants called no witnesses and filed no submissions within the 14 days that were given for that purpose.

### **Issue**

The only issue to be determined is the amount of damages that the claimant must be paid as compensation for the injuries she suffered under the heads as pleaded.

## Facts and the Law

The burden of proof in civil matters such as this one rests on the one who asserts the affirmative, and the standard of proof is on a balance of probabilities- **Miller v. Minister of Pensions [1947] 2 All ER**. Assessment of damages presupposes that damages have been proved and the business that remains is the measure of the amount of the damages- see the case of **Ngosi t/a Mzumbanzumba Enterprises v. Amosi Transport Co Ltd [1992] 15 MLR 370(HC)**. The rule is that the injured party has provided proof of the damage sustained prior to the assessment hearing- **Yanu Yanu Co v. Ltd v. Mbewe 11 MLR 405 (SCA)**. Damages in a case like this one, are not awarded to punish the defendant, but to fully compensate the claimant of all the losses that he has suffered as a direct or consequential result of the defendant's wrongful act or omission. In the case of **George Kankhuni v. Shire Buslines Ltd, Civil Case Number 1905 of 2002**, Katsala, J stated as follows:

“The law demands that the plaintiff, as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as *restitution in intergrum*.”

It is not easy to quantify damages for losses that are not monetary in nature such as personal injuries. Courts as such use comparable cases as a guide to the quantification of applicable damages, without losing sight of particularities in the individual case that the court is dealing with. See **Kalinda v. Attorney General [1992] 15 Malawi Law Reports 170 @ 172**. The court will also consider factors such as passage of time since a particular comparable award was made, as well as currency fluctuations within the period between the case at hand and the comparable one- **Hon. Kennedy Kuntenga v. Attorney General, Civil Cause No. 2002 of 2002, High Court, Principal Registry, (unreported)**.

## Pain and Suffering

The word pain connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident, while suffering includes fright, fear of future disability, humiliation, embarrassment and sickness- Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8. The award of damages for pain and suffering depends upon the claimant's personal awareness of pain, and his capacity for suffering- see **Limpoh Choo v. Camden and Islington Area Health Authority [1980] AC 174 @ 183**.

## Loss of Amenities of Life

Damages are paid under the head of loss of amenities of life to compensate the claimant's deprivation of the pleasures of life, which amounts to substantial loss, whether the claimant is aware or not of that loss. See **City of Blantyre v. Sagawa [1993] 16(1) MLR 67 (SCA)**; **Kemp and Kemp, The Quantum of Damages, Vol. 1 (2<sup>nd</sup> Edition), 1961, p. 624.**

### Disfigurement

Disfigurement is concerned with change of looks of the individual. This may be scars, amputations and postures. See **Lemon Banda and 19 others v Motal Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported)**. Damages for disfigurement are awarded separately if the Claimant has been ridiculed, lost his social status, or that he is in need of plastic surgery. See **Mary Kamwendo v Stage Coach Malawi Limited Civil Cause Number 840 of 1995**.

### Extent of Injuries in this Case

The extent of injuries of the claimant is taken wholesome as it is in the evidence of Doreen Juma. The defendants did not controvert it at all. What the court gathered from the cross examination was the extent to which the claimant suffered as a result of the injuries and also the state in which she was, and is, after treatment. I also find that the claimant is now fit and able to attend school although she has post injury difficulties which is not unusual after surviving such injuries as she sustained.

### Comparable Cases

In the case of **Charles Mauzu v. Wild Batson and Prime Insurance Personal Injury Case no. 77 of 2014** a claimant sustained fractures of tibia and fibula on both legs, had multiple wounds on the right shoulder and the face, and deep cut wounds on the left and right leg. He was awarded K1, 000,000.00 for pain and suffering, and K800, 000.00 for deformity. The order of those awards was made on 16<sup>th</sup> June, 2017.

On 19<sup>th</sup> July, 2018 the High Court made an award of K1, 450,000.00 for pain and suffering and K 750,000.00 for deformity to a claimant who had sustained a fracture of the distal right leg and had been put in a Plaster of Paris and had difficulties to carry on manual work after the injury. This is the case of **Chidoola v. Chilunga and Prime Insurance, Personal Injury Cause No. 488 of 2014**.

In **Rex Walala v. Davison Chikuta and Prime Insurance Company Limited, Civil Cause No. 461 of 2011, High Court, Principal Registry**, the claimant was awarded K6, 500, 000.00 as damages for personal injury in an award made on 20<sup>th</sup> March, 2013, after he suffered a fracture of the left tibia, bruises on the left arm and cuts on his face.

### The Award

The three cases cited are comparable to this case, in terms of the injuries suffered. The **Rex Walala** case appears to be more comparable though it is a little remote in time. However, recognition in this case is given that the claimant suffered fractures on both legs and she is a minor whose suffering must have been immense. In the circumstances, I award the claimant

the sum of **K3, 500,000.00** covering damages for pain and suffering, **K1, 200,000.00** for loss of amenities of life and **K1, 200, 000.00** for disfigurement. I also award her K3, 000.00 special damages as cost of obtaining the police report that was tendered showing that sum was paid for under General Receipt number 5844164. The claimant brought no proof of his expense in obtaining a medical report. I award her nothing under that head.

### **Conclusion**

The claimant is awarded a total of **K 5, 903, 000.00** as damages for the personal injuries she suffered. As per the Order of the Court dated 29<sup>th</sup> May, 2020, the liability in damages to the 2<sup>nd</sup> Defendant is limited to K5, 000, 000.00 as per the policy of insurance with its insured. The claimant is further awarded costs of the assessment hearing.

Made this 16th day of October, 2020.



**Austin Jesse Banda**

**ASSISTANT REGISTRAR**